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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. JACKIE DELBERT TAYLOR, Defendant and Appellant.	C062413 (Super. Ct. No. CM027482)

APPEAL from a judgment of the Superior Court of Butte County, Steven J. Howell, Judge. Affirmed as modified.

Rita Barker, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of part II.

Penal Code section 1202.4, subdivision (f)(3)(H) authorizes restitution for "[a]ctual and reasonable attorney's fees" incurred by the victim as a result of the defendant's criminal conduct. This appeal addresses whether a court may order restitution for a contingency fee paid by the victim without first determining whether the fee was reasonable under the lodestar method for calculating attorney fees. In the published part of this opinion, we disagree with the decision of Division One of the Fourth District Court of Appeal in *People v. Millard* (2009) 175 Cal.App.4th 7 (*Millard*), and conclude a trial court can award victim restitution for contingency fees without a lodestar analysis. In the unpublished portion, we conclude defendant was entitled to additional presentence conduct and custody credits.

BACKGROUND

On July 29, 2007, defendant Jackie Delbert Taylor crossed a double yellow line while trying to pass another vehicle, had a head-on collision, and fled the scene before emergency personnel arrived. Defendant's victim, Kevin Bailey, sustained significant injuries to his arm and his car was totaled.

Defendant pled no contest to hit and run causing injury (Veh. Code, § 20001, subd. (a)), admitted a "strike" (Pen. Code,

§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)),[1] and entered a no contest plea in an unrelated case.

The trial court sentenced defendant to six years in prison, suspended proceedings pursuant to section 3051 of the Welfare and Institutions Code, and committed defendant to the California Rehabilitation Center (CRC). The trial court subsequently determined defendant's strike rendered him ineligible for CRC commitment, and imposed the original sentence. Following testimony from Bailey, the trial court ordered $44,554.83 in victim restitution, including $8,333.33 in attorney fees.

Defendant appeals, challenging the award of victim restitution for attorney fees and the trial court's calculation of presentence credits.

DISCUSSION

I

Section 28 of the California Constitution was added to article I by voters in the June 1982 Primary Election, and was amended and renumbered in the 2008 General Election. Commonly known as the Victims' Bill of Rights, it gives all crime victims the constitutional right to receive restitution "from the persons convicted of the crimes causing the losses they suffer." (Cal. Const., art. I, § 28, subd. (b)(13)(A).) The Legislature has "enacted various provisions to implement [section 28's] call for mandatory restitution from persons convicted of crimes to

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[1] Further undesignated statutory references are to the Penal Code.

their victims. [Citation.]" (*People v. Birkett* (1999) 21 Cal.4th 226, 236.)

Section 1202.4 is one such enactment. Pursuant to subdivision (f), the "court shall require" a defendant to make restitution to the victim for all economic losses incurred by the victim as a result of his criminal conduct. Applying the constitutional right to restitution, the statute mandates: "The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record." The language from section 1202.4, subdivision (f), is taken from the California Constitution's guarantee of victim restitution, former California Constitution, article I, section 28, subdivision (13)(b), which stated: "Restitution shall be ordered from the convicted persons in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary." This was amended by Proposition 9 in 2008, and now reads as follows: "Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss." (Cal. Const., art I, § 28, subd. (13)(b).) As amended, the California Constitution now requires trial courts to order victim restitution whenever the victim suffers a loss.

Evidence was presented at the restitution hearing that Bailey incurred $8,333.33 in attorney fees as a result of the hit and run accident, a contingency fee of 33 1/3 percent of his

settlement from the insurance company. The trial court included compensation for the contingency fee in its restitution order.

Defendant contends the award of restitution for the contingency fee was unreasonable as the trial court should have first determined what would be a reasonable fee under the lodestar method for calculating attorney fees.[2] We disagree.

We review a challenge to the amount of victim restitution for abuse of discretion. (*People v. Baker* (2005) 126 Cal.App.4th 463, 468-469.) As this court recently noted, "'A victim's restitution right is to be broadly and liberally construed.'" (*People v. Moore* (2009) 177 Cal.App.4th 1229, 1231.) "'"When there is a factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court."' [Citations.]" (*In re Johnny M.* (2002) 100 Cal.App.4th 1128, 1132.) Once the victim makes a prima facie showing of economic losses incurred as a result of the defendant's criminal acts, the burden shifts to the defendant to disprove the amount of losses claimed by the victim. (*People v. Fulton* (2003) 109 Cal.App.4th 876, 886.)

Defendant's claim is based on *Millard*, a driving under the influence case with serious injuries, where the victim obtained

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[2] To establish a reasonable fee under the lodestar method, the court multiplies the number of hours reasonably expended by a reasonable hourly rate to compute what is called the lodestar, or touchstone. (*Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1240; *Davis v. City of San Diego* (2003) 106 Cal.App.4th 893, 903.)

a $1,100,000 settlement from the defendant's insurance company, and paid his attorney a $366,666 contingency fee. (*Millard, supra,* 175 Cal.App.4th at pp. 13, 20-21.) After taking testimony on the contingency fee, the trial court in *Millard* determined the victim's attorney spent between 100 and 200 hours on the case, for an hourly fee of at least $1,833, which it characterized as an "'unconscionable'" fee for such a "'slam dunk'" case. (*Id.* at p. 22.) Nonetheless, the trial court ruled it did not have the "'right or jurisdiction to interfere with the contingent fee arrangement between the victim and his counsel,'" and ordered restitution for the contingent fee, prorated to exclude the portion of the fee attributed to the award for pain and suffering. (*Id.* at pp. 22-23.)

The Court of Appeal in *Millard* found the trial court's award of attorney fees was an abuse of discretion "because it either: (1) awarded attorney fees it found were unconscionable/unreasonable; or (2) even if it implicitly found those fees were reasonable based solely on the contingency fee agreement, it did not apply the correct legal standard in determining the amount of reasonable attorney fees." (*Millard, supra*, 175 Cal.App.4th at p. 31.)

The *Millard* court concluded the trial court erred by not applying the lodestar method for calculating attorney fees. (*Id.* at p. 32.) It declared: "Unless a statute provides otherwise, it is presumed the Legislature intended that the amount of a statutory award of reasonable attorney fees should

be determined by application of the lodestar adjustment method. [Citations.]" (*Ibid*.)

Applying this rule, the Court of Appeal declared: "A court 'may not determine a "reasonable" attorney fee solely by reference to the amount due under a contingency agreement.' [Citation.] Rather, a court must begin with the lodestar calculation and then make adjustments upward or downward based on the factors discussed in *Ketchum* [*v. Moses* (2001) 24 Cal.4th 1122], including whether there is a contingency fee arrangement. [Citation.] After considering all relevant factors, a court may ultimately, but is not compelled to, award as reasonable those fees set forth in a contingency fee agreement. [Citations]" (*Millard, supra*, 175 Cal.App.4th at p. 33, italics omitted.)

We agree with *Millard's* first holding. A crime victim is entitled to restitution only for "[a]ctual and reasonable attorney's fees . . . ." (§ 1202.4, subd. (f)(3)(H).) The trial court in *Millard* ignored the Legislature's directive and awarded restitution for attorney fees which it had found were "'unconscionable'" in a "'slam dunk'" case. This was an abuse of discretion.

However, we decline to follow *Millard's* alternative holding. *Millard* relied on *Ketchum v. Moses, supra,* 24 Cal.4th 1122 (*Ketchum*), to conclude that the trial court was required to apply the lodestar calculation to the contingency fee. (*Millard, supra*, 175 Cal.App.4th at pp. 32-33.) In *Ketchum*, the Supreme Court held the lodestar method established in the

Serrano[3] litigation was appropriate for calculating an award of attorney fees following a civil defendant's successful anti-SLAPP (strategic lawsuit against public participation) motion. (Code Civ. Proc., § 425.16). (*Ketchum, supra*, 24 Cal.4th at pp. 1127, 1130-1131, 1134-1136.) The Supreme Court noted that Courts of Appeal applied this method to a "broad range of statutes authorizing attorney fees" in civil cases, and cited with approval a Court of Appeal's observation that the "'Legislature appears to have endorsed the [lodestar adjustment] method of calculating fees, except in certain limited situations.' [Citation]." (*Id.* at pp. 1134-1135.)

The Supreme Court also made clear its holding did not establish a presumption in favor of the lodestar method. "We emphasize, however, that although we are persuaded that the lodestar adjustment approach should be applied to fee awards under Code of Civil Procedure section 425.16, we are not mandating a blanket 'lodestar only' approach; every fee-shifting statute must be construed on its own merits and nothing in *Serrano* jurisprudence suggests otherwise." (*Ketchum, supra*, 24 Cal.4th at p. 1136.) *Millard's* rote application of the lodestar method ignores this essential point.

The lodestar method is a fee shifting mechanism applied in contexts such as civil litigation which confers a "'significant

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[3] *Serrano v. Priest* (1977) 20 Cal.3d 25; *Serrano v. Unruh* (1982) 32 Cal.3d 621. (See *Ketchum, supra*, 24 Cal.4th at pp. 1130-1131.)

benefit'" to the public (*Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 317-318, 321-322), compensation for the enforcement of public rights under a private attorney general theory (*Serrano v. Priest, supra*, 20 Cal.3d at pp. 46-47; Code Civ. Proc., § 1021.5), or to bring about attorney fee shifting to discourage SLAPP suits (*Ketchum, supra*, 24 Cal.4th at pp. 1130-1131.) Victim restitution presents different interests. Although "there are objectives -- apart from simply providing victim indemnification -- that underlie the state's policy of requiring a criminal defendant to pay restitution to his victim," the "*primary* purpose of victim restitution is to fully reimburse the victim for his or her economic losses." (*People v. Jennings* (2005) 128 Cal.App.4th 42, 57, original italics.)

The attorney fee awards addressed in *Ketchum, Serrano*, and related cases are intended to encourage litigation which benefits the public or discourage litigation contrary to the public interest. Fee awards in these cases must be finely tuned so that litigation is neither excessively encouraged nor discouraged. Victim restitution for attorney fees is not intended to encourage or discourage litigation; the civil case in which the victim incurs attorney fees is separate from the criminal case where the restitution is awarded. Instead, victim restitution for attorney fees is intended to make the victim whole.

A crime victim who seeks redress for his injuries in a civil suit can expect to pay counsel with a contingency fee. "[I]t is a rare personal injury plaintiff who has the assets to

pay for legal representation on an hourly basis plus costs, and also has the willingness to assume the financial risk of not prevailing in the lawsuit. For this reason, almost all plaintiff retainer agreements in personal injury actions are on a contingency fee basis, with the lawyer's fees and costs to be paid from a judgment in favor of the client, and the lawyer receiving nothing if the client loses the lawsuit." (*Gilman v. Dalby* (2009) 176 Cal.App.4th 606, 619.)

If counsel is successful, the contingency fee is likely to be higher than an hourly fee for equivalent work. "It has been repeatedly recognized that a contingent fee '"may properly provide for a larger compensation than would otherwise be reasonable."' [Citations.]" (*Cazares v. Saenz* (1989) 208 Cal.App.3d 279, 287.) Counsel paid by a contingency fee bears the risk that the client will not prevail, or that "the amount recovered will yield a percentage fee which does not provide adequate compensation," and "finances the case for the client during the pendency of the lawsuit." (*Id*. at p. 288.)

The *Millard* decision noted the lodestar calculation took into account the contingent nature of a claim, which could justify "'a fee enhancement, or so-called multiplier, for contingent risk.'" (*Millard, supra*, 175 Cal.App.4th at p. 32, quoting *Ketchum, supra*, 24 Cal.4th at p. 1132.) As we have already explained, this method is not intended to compensate crime victims for their losses, but is a fee shifting mechanism in civil litigation beneficial to the public, employed to "bring the financial incentives for attorneys enforcing important

constitutional [or other] rights . . . into line with incentives they have to undertake claims for which they are paid on a fee-for-services basis." (*Ketchum, supra*, 24 Cal.4th at p. 1132.)

Applying the lodestar to attorney fees incurred by crime victims overlooks the fundamental purpose of the statutory and constitutional right to victim restitution, awarding "full restitution" to the victim absent "compelling and extraordinary reasons for not doing so . . . ." (§ 1202.4, subd. (f).) Since a victim will likely have to pay a contingent fee in any personal injury action resulting from the crime, evidence that the victim incurred the contingent fee is prima facie evidence of a loss entitling him to compensation.

"[A] wrongdoer in criminal cases as in civil torts takes his victim as he finds him." (*People v. Cameron* (1975) 53 Cal.App.3d 786, 790.) If a defendant feels the victim is seeking restitution for unreasonable attorney fees, he may present argument and evidence supporting his position. However, where there is uncontradicted evidence the victim incurred attorney fees as a result of the defendant's actions, it is not an abuse of discretion to award restitution for the fee without resorting to the lodestar method.

Defendant did not submit any evidence that the attorney fee paid by the victim was unreasonable, and did not contest restitution for the contingency fee. The contingent fee paid by the victim, 33 1/3 percent of the total award, is the typical amount paid under a contingency fee contract. (*Lucero v. Aladdin Beauty Colleges* (N.M. 1994) 117 N.M. 269, 272.) The

trial court's award of restitution for the contingency was not an abuse of discretion.

II

Defendant was taken into custody in Butte County on April 18, 2008, and committed to the CRC on June 24, 2008. He was received at the CRC on July 3, 2008.

On August 6, 2008, defendant wrote a letter to the trial court indicating he had learned he was ineligible for the CRC due to his prior strike. However, the CRC elected to retain defendant on August 20, 2008. On April 21, 2009, the CRC corrected its earlier misunderstanding of the law, and informed defendant that he was ineligible for commitment because of his prior strike conviction. The CRC told the court of its decision on May 29, 2009.

Defendant was returned to Butte County jail on September 2, 2009. On October 13, 2009, the trial court terminated defendant's CRC commitment and executed the original six-year prison sentence. The court calculated the presentence credits as follows: 434 days' credit for time in custody, consisting of 322 days' for the CRC commitment and 112 days' local time, plus 56 days' conduct credit pursuant to section 4019, for a total of 490 days.

The parties agree that the trial court miscalculated the time defendant spent in custody. Defendant was in local custody from April 18, 2008, to July 3, 2008, a total of 77 days, and from September 2, 2009, until October 13, 2009, for an additional 42 days, for a total of 119 days in local custody.

He was in CRC from July 4, 2008, to September 1, 2009, which equals 425 days. Added together, defendant spent 544 days in custody, rather than the 434 days awarded by the trial court.

The parties disagree on whether defendant is entitled to conduct or work-time credits for the time served in CRC after he was found ineligible. Defendant argues he is entitled to conduct credits for this time pursuant to section 4019, while the Attorney General invokes the "Three Strikes" law, and claims defendant is entitled to work time credits equal to 20 percent of the time served.

A defendant is generally not entitled to conduct credits for time served at the CRC. (*People v. Nubla* (1999) 74 Cal.App.4th 719, 731 (*Nubla*); see *People v. Jones* (1995) 11 Cal.4th 118, 121-125.) Since section 4019 is intended to encourage good behavior by inmates (*People v. Moore* (1991) 226 Cal.App.3d 783, 787), it does not violate equal protection to deny conduct credits to CRC inmates because they have other incentives for good behavior. (*People v. Guzman* (1995) 40 Cal.App.4th 691, 695 (*Guzman*).)

This rationale does not apply to time served in the CRC after a prisoner has been excluded and is no longer receiving treatment. "Although a person who spends presentence time in custody at the CRC *after being excluded from the CRC* is not being held in a *penal* institution, the state's interest in encouraging such a person's good behavior is identical to its interest in encouraging the good behavior of presentence county

jail detainees." (*Guzman, supra*, 40 Cal.App.4th at p. 695, original italics.)

Equal protection forbids this sort of disparate treatment of prisoners. Following this rationale, Courts of Appeal have held that a defendant is entitled to section 4019 credits for time spent in the CRC after his exclusion. (*Guzman, supra*, 40 Cal.App.4th at p. 695; *Nubla, supra*, 74 Cal.App.4th at p. 731; see also *People v. Bryant* (2009) 174 Cal.App.4th 175, 177, 182-184 [applying *Guzman* and *Nubla* to commitment to state hospital pursuant to § 1370].) Defendant asks us to apply *Guzman* and *Nubla* and award section 4019 credits for the time served in the CRC after he was deemed ineligible.

In *Guzman* and *Nubla*, the defendants were initially eligible for commitment, but later excluded. (*Guzman, supra*, 40 Cal.App.4th at p. 693 [excluded because of "'self proclaimed gang affiliation'"]; *Nubla, supra*, 74 Cal.App.4th at p. 724 [excluded due to "'proneness for violence [as evidenced by] the circumstances of his current convictions'"].) The Attorney General argues these decisions are inapposite as defendant's initial commitment to the CRC was unauthorized because of his prior strike conviction.

The rule of these cases does not turn on whether the defendant's initial commitment to the CRC was valid. Like the defendants in *Guzman* and *Nubla*, the defendant in the instant case served time in the CRC after he was no longer being treated, and no longer had an incentive for good behavior. Unlike the defendant in *Guzman*, the defendant here did no wrong

during his time in the CRC and, before the CRC correctly ascertained his status, was informed by the court he was ineligible for the CRC. *Guzman* and *Nubla* cannot be distinguished; those cases apply with equal force to a defendant whose initial commitment to the CRC was invalid, and who even notifies the CRC of his ineligibility.

The Attorney General also contends defendant's claim is foreclosed by *People v. Mitchell* (2004) 118 Cal.App.4th 1145 (*Mitchell*). In *Mitchell*, the defendant was not eligible for the CRC at the time of his commitment. (*Id*. at p. 1149.) He was excluded from the CRC, but spent time in that institution before being returned to local custody. (*Id*. at p. 1147.) The Court of Appeal concluded: "[I]neligibility [for the CRC] that is neither the result of the defendant's postsentencing conduct nor within his control voids the commitment and triggers the defendant's right to receive the same credits he would have received had he been sentenced to prison in the first instance." (*Id*. at p. 1149.)

Under the Three Strikes law, a defendant with a prior strike conviction is limited to 20 percent work time credit for prison time. (§§ 667, subd. (c)(5) & 1170.12, subd. (a)(5).) The Attorney General argues we should apply *Mitchell*, and award defendant work time credit (§ 2933) equal to 20 percent of the time served in the CRC after exclusion.

This argument misconstrues *Mitchell*. The defendant in *Mitchell* was deemed ineligible for the CRC On January 29, 2003, but was not transferred to local custody until May 2, 2003.

(*Mitchell, supra*, 118 Cal.App.4th at p. 1147.) Applying the rationale of the passage quoted above, the Court of Appeal held the defendant was entitled to section 2933 good conduct credits for the time from when he was deemed ineligible until the day the sentence was imposed, June 10, 2003. (*Id.* at p. 1150.)

The *Mitchell* decision did not end there, as the Court of Appeal also stated: "But Mitchell cannot double-dip. As noted above, the trial court gave Mitchell section 4019 credits for May 2 to June 10, and the Attorney General conceded that Mitchell is entitled to section 4019 credits for January 29 to May 2. Since the credit afforded by section 2933 is greater than the credit afforded by section 4019, and since Mitchell is entitled to the credit most favorable to him but not both, it follows that he is entitled to the section 2933 credits for these days, but not the section 4019 credits. [Citation.]" (*Mitchell, supra*, 118 Cal.App.4th at p. 1150.)

Section 4019 would award defendant more conduct credits than the 20 percent defendant would receive for prison time. It does no violence to *Mitchell* to give defendant the more generous award of credits. We agree with *Guzman* and *Nubla*, and hold defendant is entitled to section 4019 credits for CRC time after his exclusion.

Defendant was excluded from the CRC on April 21, 2009, and returned to local custody on September 2, 2009, where he remained until October 13, 2009, for a total of 176 days. Added to the 77 days' local time before his CRC commitment, defendant served 253 days' custody subject to section 4019 credits.

Applying section 4019, defendant is entitled to one-fourth of that time, discounting any remainder, doubling that number, and discounting the remainder, for a total of 126 days' conduct credit.[4] (See *People v. Culp* (2002) 100 Cal.App.4th 1278, 1283.)

Defendant's total presentence credit is 670 days, consisting of 544 days' actual custody and 126 days' conduct credit. We shall modify the award of credits accordingly.

DISPOSITION

The judgment is modified to reflect that defendant is entitled to 670 days of conduct credit, consisting of 544 days' local time and 126 days' conduct credit. As modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect this modification and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

NICHOLSON, Acting P. J.

We concur:

HULL, J.

ROBIE, J.

[4] Because defendant was charged with and admitted a prior strike conviction, he is not entitled to the additional credits under the amendments to section 4019.